

THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 32

(Emeryville, CA)

BIOMED GENERAL and
INSTITUTE FOR NATURAL RESOURCES¹

Joint Employer²

and

Case 32-RC-4643

TEAMSTERS LOCAL 853, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Joint Employers are engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The names of the Joint Employers appear as corrected at the hearing.

² During the hearing, the Employers maintained that Biomed General and Institute for Natural Resources are not single or joint employers. In their post-hearing brief, however, the Employers concurred that based on the record, they constitute joint employers. Accordingly, based on the record, I find that Biomed and Institute for Natural Resources are joint employers and they are hereinafter collectively referred to as the Joint Employers.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Joint Employers.

4. A question affecting commerce exists concerning the representation of certain employees of the Joint Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Joint Employers constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time shipping, registration, planning, production, accreditation, and publishing employees, including department managers, employed by Biomed General and Institute for Natural Resources at their facilities located at 5801 Christie Avenue, Emeryville, California; excluding all other employees, lecturers³, guards and supervisors as defined in the Act.

The Petitioner seeks an election in a unit composed of all full-time and regular part-time shipping, registration, planning, production, accreditation, and publishing employees employed by the Joint Employers at their facilities located at 5801 Christie Avenue, Emeryville, California; excluding all other employees, lecturers, department managers, guards and supervisors as defined in the Act.⁴

The Joint Employers maintain that the only appropriate unit must include lecturers inasmuch as they share a community of interest with the employees in the petitioned-for unit. The Joint Employers further contend that department managers should be included in the unit inasmuch as they are not supervisors within the meaning of Section 2(11) of the Act. The Petitioner, however, contends that department managers are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit.

Institute for Natural Resources, herein called INR, is a non profit, tax exempt organization. Each year, INR conducts approximately 500 to 600 seminars related to health care, pharmacology, and nutrition during approximately 47 weeks per year. President Richard Coleman and First VP/Office Manager Lue-Yen Tucker are responsible for deciding the number of seminars to be held during a given time interval and the cities in which the seminars will be held.

³ The term "lecturers" is used interchangeably in the record with the term "instructors" to describe the same classification of employees.

⁴ The unit sought by the Petitioner is as amended at the hearing.

Biomed is primarily engaged in the business of publishing books related to health care, which books are almost exclusively sold at INR's seminars. The work performed by Biomed's publishing department is supervised by Tucker. Biomed also offers seminars, primarily in Canada, related to the field of health care which are similar to the seminars conducted by INR.⁵ The record reveals that INR and Biomed both conduct their businesses from offices located at 5801 Christie Avenue, Emeryville, California.

After the determination is made as to what seminars will be conducted and in which cities the seminars will be held, INR's planning department calls prospective hotels where both INR's and Biomed's seminars will be conducted, and reserves the meeting space at the designated locations. Once the seminar locations are booked, Coleman and Tucker make the determination as to which lecturers will conduct the seminars.

INR's production department then orders the appropriate typesetting and mailing brochures to publicize the seminars of both INR and Biomed. Thereafter, individuals who have received the seminar information contact INR to ask questions, obtain further information, or register for the seminar being offered. These inquiries regarding the seminars of both INR and Biomed are fielded by employees in INR's registration department. Following the registration process, materials concerning the programs of both INR and Biomed are then shipped to registered attendees by INR's shipping department. Finally, INR's accreditation department contacts various accreditation authorities to secure approvals for accreditation extended to the attendees of the seminars conducted by both INR and Biomed.

The Joint Employers supply all materials needed for lecturers to conduct their respective seminars, including a syllabus, transparencies, movies, films, and videos. Lecturers present the material at seminars from 9:00 a.m. to 4 p.m., throughout which appropriate breaks are taken. Seminar attendees are asked to complete standardized examinations relating to the seminar. While lecturers do not grade the exams, they monitor the taking of exams, which typically last 15 to 20 minutes. Instructors are also expected to monitor attendance and registration at the seminars site and complete registration arrangements for attendees who did not register in advance.

Not all instructors reside within the State of California.⁶ Inasmuch as the Joint Employers conduct seminars throughout the United States and Canada, the geographic residence of the instructors is often a factor in determining which instructor

⁵ Although the record does not reflect who makes the determination within Biomed as to which seminars to conduct, the record reflects that Coleman holds the title of President of both organizations.

⁶ The record reveals that at least one instructor resides in Texas.

will conduct seminars within a particular geographic area. A given instructor, therefore, may be present in the offices in Emeryville as often as several times a week or as infrequently as every 6 months. While conducting seminars in various locations, instructors are eligible to receive per diem and other reimbursement for travel expenses. In any event, unlike all other employees in the petitioned for unit, it appears instructors do not report for work every day of every work week to the Emeryville facility.

Instructors are evaluated by forms completed by the seminar registrants and occasionally by an evaluator sent to the seminar site. All instructors receive workers' compensation insurance coverage and statutory benefits such as unemployment, social security, and Medicare. Pursuant to instructors' employment agreements, however, instructors are not eligible to receive benefits described in the employee handbook that are offered to employees in the petitioned-for unit.

At least some of the instructors employed by the Joint Employers have advanced degrees that convey credibility on their performances and aid in drawing a larger crowd to the seminars.⁷ While the Joint Employers have, in the past, employed a lecturer who did not have a bachelor's degree, the program was more popular when conducted by an individual who had a law degree. Some lecturers may be engaged in professional pursuits in addition to delivering lectures for the Employers, although they are prohibited from employment by any organization in competition with the Joint Employer's interests.

The lecturers' annual salaries range from \$55,000 to \$65,000. In addition, the lecturers are subject to employment contracts that do not apply to any employees in the petitioned-for unit.

Within each department of INR and Biomed are department managers. With the exception of the planning department, managers in the remaining five departments spend one hundred percent of their time performing the same tasks as the persons working in their respective departments. Within the planning department, 90 percent of the planning department manager's time is spent performing functions identical to those performed by the other employees in that department. The remaining 10 percent is spent making travel arrangements for instructors and delegating various duties to employees within the department, such as reserving hotel space within certain geographic areas.

Although the record reveals one instance in which a department manager conducted an employee interview prior to hiring, all hiring decisions are made by Coleman and Tucker. Similarly, Coleman and Tucker are responsible for setting employees' initial rates of pay. With the exception of informal discussions about evaluations with department managers, employee evaluations are conducted by Coleman

⁷ Some instructors referred to on the record include a dentist and a thoracic surgeon. The record does not reflect what experience or educational background, if any, is required of employees in the petitioned-for unit.

and Tucker, and department managers are evaluated in the same manner as other employees. If warranted, employees receive pay increases following evaluations, which increases are determined by Coleman and Tucker.

Coleman alone has the authority to transfer employees between departments, although Tucker has the authority to inform employees about any transfers. Department managers have no authority to make decisions regarding transfers.

Department managers do not have the authority to terminate employees. All determinations regarding termination and discipline are made by Tucker and Coleman. Managers, however, have the authority to issue written warnings when instructed to do so by Tucker. Moreover, although employees may submit their requests for leave or any other time off to their department managers, approval or denial of these requests are made exclusively by Coleman and Tucker.

Employee meetings are held which include managers; no special meetings are conducted for only department managers. Department managers and employees are eligible for the same medical plan, vacation time, sick leave, and retirement plan.

Employees in the shipping department earn \$9.00 to \$11.00 per hour, while the shipping department manager earns \$15.00 per hour. Employees in the planning department earn \$12.00 to \$12.50 per hour, while the department assistant manager and department manager each receive a \$40,000 annual salary. Registration department employees earn \$10.50 to \$11.75 per hour, while the department manager earns \$18.00 per hour. The one accreditation department employee receives an annual salary of \$30,000, while the department manager earns \$35,000 per year. The employees in the production department earn \$12.25 to \$13.00 per hour, while the manager receives a \$45,000 annual salary. The highest rate of pay of employees in the publication department is \$13.50 per hour, while the department manager receives an annual salary of \$37,000.

The record does not reveal whether there is a prior history of collective bargaining regarding any classification of employees employed by the Joint Employers.

The first issue presented is whether the unit sought by the Petitioner is appropriate for the purpose of collective bargaining. The Joint Employers contend that it is not an appropriate unit because it does not include the instructors, arguing that the instructors share a community of interests with the unit employees as to mandate their inclusion. In making unit determinations, the Board's task is not to determine the most appropriate unit, but simply to determine *an* appropriate unit. P.J. Dick Contracting, 290 NLRB 150 (1988). In so doing, the Board looks "first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will scrutinize the Employer's proposals." Dezcon, Inc., 295 NLRB 109, 111 (1989). A petitioner must demonstrate that the employees in the petitioned-for unit share a sufficient "community of interest" so as to constitute an appropriate bargaining unit.

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).
Factors which determine this community of interest include:

[S]imilarity in methods of work or compensation, similar hours of work, employment benefits, common supervision, similar qualifications, training and skills, similarity in job functions and the location where job duties are performed, the amount of interaction and contact with other employees, integration and interchange of work functions with other employees and the history of bargaining.

Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).

Application of the enumerated factors to the present case demonstrates that the requisite community of interest does not exist between instructors and the employees in the petitioned-for unit so as to require their inclusion in the appropriate unit. Unlike any other classification in the petitioned-for unit, instructors conduct seminars throughout the United States and Canada and monitor examinations taken by seminar attendees. Because of their frequent travel and because some instructors do not reside within the State of California, instructors may infrequently visit the Joint Employers' facilities in Emeryville. Although instructors may contact employees in the petitioned-for unit in order to clarify travel arrangements or ask questions about seminar materials, the record does not establish that the duties of the instructors overlap with the duties of employees in the petitioned-for unit.

The record reveals that instructors' work schedules, unlike the schedules of employees in the petitioned-for unit, vary according to the number of seminars scheduled to be conducted. Instructors are subject to an employment agreement that is not applicable to any other employee in the petitioned-for unit. Pursuant to this employment agreement, instructors are not eligible for benefits offered to other employees, but are eligible for reimbursement for travel expenses which are not applicable to employees in the petitioned-for unit. Instructors are usually evaluated based upon the evaluations provided by seminar attendees; by contrast, employees in the petitioned-for unit are evaluated based upon observations by the department manager, Coleman, and Tucker.

The record further reveals that some, if not all, of the Joint Employers' current instructors hold advanced degrees. The record does not establish that any specialized training or educational background is required of employees in the petitioned-for unit. Further, instructors receive a higher salary than employees in the petitioned-for unit and department managers.

The Joint Employers contend that their operations are functionally integrated inasmuch as the efforts of each department are essential to the success of each other department and for the instructors to successfully present the product to the public at seminars. Although instructors rely upon employees in the petitioned-for unit to

prepare and ship seminar materials and make appropriate travel arrangements, the integration of the work process is only one factor to be considered in establishing a community of interest. As noted above, the record reveals that there is no interchange of work functions between instructors and employees in the petitioned-for unit. Instructors are subject to different duties, benefits, work sites, evaluation processes, salaries, and employment agreements than the employees in the petitioned-for unit.

The Joint Employers further argue that because the record does not reveal that the instructors have any special skills beyond those of the employees in the petitioned-for unit, they should be included in the unit. The record reveals, however, that instructors with an advanced degree are desirable inasmuch as they attract greater attendance at the seminars. It is unlikely that the public perception of the educational background of employees in the petitioned-for unit is considered by the Joint Employers in making the determination to hire these employees. Accordingly, the Joint Employers' argument is rejected.

Based on the above and the record as a whole, it is concluded that instructors do not share a sufficient community of interest with employees in the petitioned-for unit so as to mandate their inclusion in the unit. I find, therefore, that the petitioned-for unit is an appropriate unit for collective-bargaining purposes.

The remaining issue is whether department managers are supervisors within the meaning of Section 2(11) of the Act so as to require their exclusion from the unit. To qualify as a supervisor, it is not necessary that an individual possess all of the authority specified in Section 2(11) of the Act. Rather, the possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985). Consistent with the statutory language and the legislative intent, however, it is well established that the disjunctive listing of supervisory indicia in Section 2(11) does not alter the requirement that a supervisor must exercise independent judgment in performing the enumerated functions. Thus, the exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into supervisory ranks, the test of which must be the significance of judgment and directions. Opelika Foundry, 281 NLRB 897, 899 (1986). The burden of providing supervisory status rests on the party alleging that such status exists. Tucson Gas & Electric Co., 241 NLRB 181 (1979). The Board will refrain from construing supervisory status too broadly because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co., 308 NLRB 101, 102 (1992).

The record reveals that Coleman and Tucker, not the department managers, have the sole authority to hire, fire, discipline, transfer, and grant leave requests. Further, department managers receive the same benefits, attend the same employee meetings, and are subject to the same evaluation process as employees in the appropriate bargaining unit. The vast majority, if not all, of department managers' work days are spent performing duties identical to the duties of employees in the appropriate unit and delegating routine tasks. Although department managers earn higher wages than

employees in the petitioned-for unit, this factor is a secondary indicator of supervisory status and is not dispositive of the issue.

The Petitioner contends that department managers have the authority to hire and interview employees. While the record does reveal one instance in which a department manager interviewed an individual and subsequently made an employment offer over the phone, the record does not reveal that the department manager was solely, if at all, responsible for recommending or making the decision to hire this employee. The record does not establish that the department manager exercised any independent judgment or had any role in the hiring process other than conducting the initial interview and communicating the decision to hire to the prospective employee.

The Petitioner further maintains that managers have the authority to issue warnings to employees. The record reveals one instance in which an employee received a written warning from a department manager. In this case, however, the department manager was instructed by Tucker to issue the written warning. The record does not establish that department managers have the authority to independently issue written warnings to employees in the petitioned-for unit.

Finally, the Petitioner contends that department managers are solely responsible for evaluating employees. The record reveals that on two occasions, department managers reviewed written evaluation forms with unit employees. The record, however, does not reveal that the department managers exercised independent judgment in reviewing these evaluations; it is unclear whether the managers discussed the evaluations with Coleman or Tucker prior to reviewing the evaluations with employees in the petitioned-for unit. Moreover, the record does not reveal whether the evaluations contain recommendations that ultimately affect the job status of employees. Mt. Sinai Hospital, 325 NLRB #214 (1998). Inasmuch as the record does not reveal the particular acts and judgments that make up the performance evaluation process, the review of evaluations by the managers does not support the finding that department managers are supervisors within the meaning of the Act. Accordingly, I find that the Petitioner has not met its burden of establishing that the department managers are statutory supervisors within the meaning of Section 2(11) of the Act. Chrome Deposit Corporation, 323 NLRB 961 (1997); North Shore Weeklies, Inc., 317 NLRB 1128 (1995). Based on the record as a whole, it is concluded that department managers are not supervisors as defined in the Act, and I shall, therefore, include them in the appropriate unit.

There are approximately 31 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work

during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are those employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Teamsters Local 853, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to this election should have access to a list of voters in the unit and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Joint Employers with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 32, 1301 Clay Street, Room 300N, Oakland, California, 94612-5211, on or before August 16, 1999. No extension of time to file the list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement herein imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 1022.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by August 23, 1999.

DATED at Oakland, California, this 9th day of August, 1999.

Veronica I. Clements
Acting Regional Director,
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